United Nations AT/DEC/1178

Administrative Tribunal

Distr. Limited
30 September 2004

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1178

Case No. 1270: SHAO Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, First Vice-President, presiding; Ms. Brigitte Stern, Second Vice-President; Mr. Dayendra Sena Wijewardane;

Whereas at the request of Tzu-ping Shao, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 December 1996 and periodically thereafter until 15 October 2002;

Whereas, on 7 October 2002, the Applicant filed an Application containing pleas which read, in part, as follows:

"II: PLEAS

7. With respect to ... procedure, the Applicant respectfully requests the Tribunal:

...

(c) *to decide* to hold oral proceedings ...

(d) *to order* the production of records in connection with the filling of all P-5 vacancies in [Office of Human Resources Management (OHRM)] for the period 1992-1995;

(e) to order the production of the files from OHRM and minutes of the meetings of the [Appointment and Promotion Committee (APC)] on the decision to terminate the Applicant's contract...

8. On the merits, the Applicant respectfully requests the Tribunal:

(a) *to rescind* the decisions of the Secretary-General rejecting the Applicant's claims of biased and discriminatory treatment;

(b) *to find and rule* that the Joint Appeals Board [(JAB)] panels erred ... in failing to provide appropriate and adequate compensation for the harm done to the Applicant for violation of his rights to fair treatment under the Staff Rules and Regulations;

(c) *to award* the Applicant compensation in the amount of three years' net base pay in recognition of the exceptional circumstances of the case;

(d) *to award* the Applicant appropriate and adequate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's procedural irregularities and delays and in mishandling his claims, including the recommendation for termination of his appointment and the subsequent unjustified decision placing him on special leave with full pay (SLWFP);

(e) *to award* the Applicant as cost, the sum of $7,500.00 in legal fees and $500.00 in expenses and disbursements."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 March 2003 and periodically thereafter until 31 July 2003;

Whereas the Respondent filed his Answer on 31 July 2003;

Whereas the Applicant filed Written Observations on 1 October 2003;

Whereas on 22 December 2003, the Respondent withdrew the original Respondent's Answer and filed an amended Answer;

Whereas the Applicant filed Written Observations on the amended Respondent's Answer on 24 March 2004;

Whereas, on 2 July 2004, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant joined the Organization on a probationary appointment as a Chinese Translator at the P-3 level, on 20 October 1974 and, on 1 October 1976, he was granted a permanent appointment. On 16 February 1980, the Applicant was transferred to Rules and Personnel Manual Section, Office of Personnel Services (now OHRM), and his functional title was changed to Administrative Officer. His

performance evaluation report (PER) for the period from 16 February 1980 to 11 December 1981 rated both his written and oral expression in English as "B" with the comment "a very good command of English" and an overall rating of "a very good performance". Effective 1 April 1982, the Applicant was promoted to the P-4 level. His PER covering the period 1 January 1982 to 31 January 1983, gave him exactly the same ratings as the previous one. Effective 1 February 1984, the Applicant was assigned to the Planning and Information Section (PAIS), OHRM, with the functional title of Planning Officer. From 26 August 1989, while the Chief, PAIS, was on mission, the Applicant was appointed as Officer-in-Charge (OiC) and was granted a special post allowance (SPA) to the P-5 level for the period 26 November 1989 through 28 February 1990.

On 29 December 1989, the Chief, PAIS, while on leave from his mission assignment, recommended that the Applicant be replaced as OiC. In response, the Assistant Secretary-General, Office of Human Resources Management (OHRM) stated, inter alia: "I consider the approach, the tone and the content of your memorandum most unfortunate" adding that there would be no change regarding the designation of the OiC of PAIS.

On 2 January 1990, the Chief, PAIS, wrote to the Executive Officer, Department of Administration and Management, complaining, inter alia, that the Applicant, while OiC, had overstepped his authority. On that same day, the Chief, PAIS, as the Applicant's supervisor, completed his PER for the period 1 February 1984 to 2 October 1988, giving the Applicant 6 "B" ratings, 6 "C" ratings and a "D" rating for written English. (This in comparison with ratings of "A" and "B" in his two previous reports.) The Applicant's overall rating was "good". On 8 February, the Applicant wrote to the Assistant Secretary-General for Human Resources Management, complaining, inter alia, that the Chief, PAIS, had accused him of "lack of personal loyalty". On 24 February the Applicant filed a rebuttal of his PER, which included harsh criticism of the Chief, PAIS, as manager and supervisor ("the first rebuttal") and, on 15 March, the Applicant confronted his supervisor, complaining about the way he had been treated. In December a Rebuttal Panel was constituted and, on 21 January 1992, that Rebuttal Panel reported that it had not been able to convene and complete its work. A new Rebuttal Panel was constituted on 31 March 1994.

On 10 April 1992, the Applicant was reassigned, with his post, to the General Service Staffing Section, OHRM. There is no personnel action form recording this movement.

On 24 June 1993, information circular ST/IC/1993/35 entitled "The 1992 Senior Officer (P-5) Promotion Register" was issued. It did not include the Applicant's name. Subsequently, on 31 August, the Applicant submitted his "recourse" against the decision not to include his name in the Register. He alleged that the delay in processing the first rebuttal had deprived the Departmental Review Panel and the Appointment and Promotion Board (APB) of a complete personnel file in time for its promotion review. On 17 November, the APB informed the Applicant that its decision stood.

On 14 January 1994, the Applicant requested administrative review of the decision not to include his name in the 1992 Senior Officer (P-5) Promotion Register and, on 12 April, the Applicant lodged an appeal with the JAB in New York against that decision ("the first case").

On 11 May 1994, the Applicant's PER for the period 3 October 1988 to 10 April 1992, was completed. The Applicant was given one "B" rating, nine "D" ratings, two "E" ratings and an "F" rating for written English, with an overall rating of "fair". The Applicant subsequently rebutted this PER ("the second rebuttal").

On 27 June 1994, the panel constituted to consider the first rebuttal submitted its report. The panel recommended that no changes be made to the Applicant's ratings, while stating that it was regrettable that the rebuttal was not addressed in a more timely fashion. The recommendation was subsequently adopted by the Director of Personnel.

On 3 August 1994, the Applicant requested administrative review of the decision to maintain the ratings on his PER and, on 13 October, the Applicant lodged an appeal with the JAB against that decision ("the second case").

On 14 October 1994, the OiC, General Service Staffing Section, wrote to the Director, Recruitment and Placement Division, OHRM, questioning the Applicant's interest and commitment to his work and criticizing his performance. She concluded by stating that "... his consistently poor performance has forced me to conclude that, as an intelligent and somewhat knowledgeable person, he may not be in his preferred element". This memorandum, which was subsequently considered as a "special report" in accordance with administrative instruction ST/AI/240 of 3 January 1977, entitled "Performance Evaluation Report System", served as the basis for withholding the Applicant's annual salary increment.

On 6 February 1995, the second Rebuttal Panel submitted its report, also concluding that it saw no grounds for any change in the Applicant's ratings, while noting that the Applicant was, "over an extended period of time, given assignments for

which he was clearly not suited". The panel also shared the Applicant's concern at the length of time taken to complete this rebuttal process. The Assistant Secretary-General, OHRM, subsequently accepted the Rebuttal Panel's conclusion.

On 6 April 1995, the Applicant requested administrative review of the decision to adopt the recommendation of the second Rebuttal Panel and to maintain the ratings on his PER and, on 30 August, the Applicant lodged an appeal against that decision with the JAB ("the third case").

By memorandum of 11 April 1995, the Director, Recruitment and Placement Division, recommended that action be initiated to separate the Applicant from service for unsatisfactory performance. Subsequently, this memorandum was also considered as a "special report". The Applicant was informed of the above recommendation on 24 April and, on 22 May, the Applicant submitted a rebuttal to the two "special reports". The Rebuttal Panel constituted to investigate the rebuttal of the "special reports" submitted its report on 29 September, recommending that no changes be made.

On 16 October 1995, the Applicant was informed that, the Assistant Secretary-General, OHRM, had accepted the recommendation of the Rebuttal Panel and subsequently a recommendation to terminate his permanent appointment for unsatisfactory performance was forwarded to the APC.

On 16 November 1995, the Applicant requested administrative review of the decision to withhold his salary increment and of the recommendation to terminate his permanent appointment.

On 1 December 1995, the Applicant submitted an appeal to the JAB requesting suspension of action on the recommendation to separate him from service. In its report of 14 December, the JAB noted that the decision to terminate the Applicant's permanent appointment had not yet been taken and recommended that the request for suspension of action be denied. On 21 December, the Under-Secretary-General for Management advised the Applicant that the Secretary-General had accepted the JAB's recommendation.

On 7 February 1996, the Applicant lodged an appeal on the merits with the JAB ("the fourth case").

On 21 February 1996, the Applicant was informed of the decision to place him on special leave with full pay (SLWFP) effective 22 February 1996 through 30 September 1996, when he would reach the mandatory retirement age.

On 9 May 1996, the JAB adopted its report in the "second case". Its considerations, conclusions and recommendations read, in part, as follows:

"*Considerations*

17. ... [T]he Panel ... was limited to examining whether the Appellant was afforded due process and whether the appraisal of the first reporting officer was motivated by prejudice or by some other extraneous factor.

...

21. While the Panel acknowledged ... lapses on the part of the Administration, it did not find that such were tantamount to an abuse of the office of the PER, or indicative of bias and prejudice towards the Appellant.

22. ... [T]he Panel was of the view that the administration was lax in monitoring the work progress of the first rebuttal panel ... While the Panel regretted that the rebuttal process was not completed in a timely fashion, it did not find that the process was fatally flawed, or that the Appellant suffered any damages.

...

Conclusions and recommendations

25. In view of the above, the Panel unanimously decided to make no recommendation in support of the appeal."

On 20 May 1996, the JAB adopted its report in the "first case". Its considerations, conclusions and recommendations read, in part, as follows:

"*Considerations*

...

24. The Panel ... agreed that its deliberations would be limited to determining whether the Appellant's right to full and fair consideration in the 1992 P-5 promotion exercise had been violated and his career prospects injured through the negligence of the Administration.

...

27. The Panel was of the view that while 'it is the responsibility of the Administration to ensure that personnel records required by promotion review boards are complete, up-to-date, and submitted in a timely fashion', the Administration's delay, in this case, *did not violate the Appellant's right to full and fair consideration in the 1992 P-5 promotion exercise and also did not injure his career prospect,* as the Appellant's PER for the period 1 January 1982 through 31 January 1984, which was before the APB, had a better rating than the subsequent PER which was not then prepared.

28. ... [T]he Panel was of the view, however, that the Administration was lax in preparing, in a timely fashion, the Appellant's PER for the period 1 February 1984 through 2 October 1988, thereby violating his rights.

Conclusions and recommendations

29. ... [T]he Panel *unanimously agreed* that the Appellant received full and fair consideration in the 1992 P-5 promotion exercise.

30. The Panel *unanimously recommends* that the Appellant be paid compensation in the amount of Five Hundred Dollars for the violation of his right to have his PER prepared in a timely fashion.

..."

On 12 July 1996, the JAB adopted its report in the "third case". Its conclusions and recommendations read, in part, as follows:

"*Conclusions and recommendations*

30. Based on the foregoing, the Panel *unanimously agreed* that the Appellant's due process rights were respected, despite the procedural flaws and delays noted above.

31. The Panel *unanimously agreed* that it could not conclude that the appraisal of the Appellant by [the Appellant's supervisor] was motivated by prejudice or by some other extraneous factor.

32. The Panel *unanimously agreed* to reject all of the requests of the Appellant, and to make no recommendation in support of the appeal."

On 25 July 1996, the Under-Secretary-General for Management transmitted copies of the three JAB reports to the Applicant and informed him that, regarding the "second case" and the "third case", the Secretary-General had decided to accept the JAB's unanimous recommendations and to take no further action on his appeals. Regarding the "first case", the Applicant was informed that:

"The Secretary-General ... is in agreement with the Panel that you received full and fair consideration in the 1992 P-5 promotion exercise. Although sharing the concern over the delay in the preparation of your ... PER, he is not in agreement with the Panel that you should be paid compensation. The Panel has even suggested that the delay in the preparation of this PER was of benefit to you. The Secretary-General has also taken note that the Panel constituted in your parallel JAB case [the "second case"] did not recommend the award of damages to you for the same concern.

In view of the above, the Secretary-General has decided to take no further action in your case."

On 26 January 1998, the JAB adopted its report in the "fourth case". Its considerations, conclusions and recommendations read, in part, as follows:

"*Considerations*

26. The Panel first considered whether or not the decision to terminate [the] Appellant's appointment was rendered moot by the subsequent decision to place him on special leave, and agreed that it did not. In addition to whatever moral and psychological damage [the] Appellant may have already suffered, the presence of the documentation relating to that decision is a potential source of embarrassment in his future career.

...

29. ... Taking all [the] evaluations at face value, the Panel could only conclude [that the] Appellant's drafting ability and performance deteriorated, and continued to deteriorate, during the entire period he was under [the supervision of the Chief, PAIS]. It is noteworthy that [the] Appellant's performance was deemed 'fully satisfactory' by another OHRM senior official, during [the Appellant's supervisor's] mission assignment in 1989.

...

31. ... After a long period of successful service, [the Appellant] was placed in a job for which he received no training and for which, ... he was temperamentally unsuited. ...

32. ... It is the Panel's view that the Organization has failed to fulfill its obligation to treat the Appellant fairly.

33. ... the Panel reviewed the procedural aspects. Here, too, it found the Administration at fault. Both PER's prepared by [the Appellant's supervisor] covered periods longer than the three years specified in paragraph 6 of ST/AI/240/Rev.1. They were, moreover, not completed in a timely fashion. Finally, the second report contains no reference by either the first or second reporting officer to the period of absence of [the Appellant's supervisor], when [the] Appellant was under the supervision of [another supervisor], who found his performance 'fully satisfactory'. The Panel also noted that material was placed on his [Official Status] file which should not have been ...

34. ... The Panel agrees that [the "special report" of the OiC, General Staffing Section] is clearly at odds with the requirements of paragraphs 6 and 16 of ST/AI/240/Rev.1, and was used as an *ex post facto* justification for withholding a within-grade salary increment.

...

Conclusions and Recommendations

36. The Panel concluded that the Administration had not ... fulfilled its 'obligation with respect to fair treatment and proper and equitable procedure for staff members'.

37. The Panel also noted that [OHRM] did not exercise sufficient care in assigning [the Appellant] to an area where his skills and experience could best be utilized and has also failed in its responsibility to the Organization by misusing and wasting a potentially valuable human resource.

38. The Panel recommends:

a) that the within-grade increment withheld from [the] Appellant be restored and paid to him, and his pensionable remuneration be accordingly readjusted;

b) that a copy of this report be placed on [the] Appellant's Official Status file; and

c) that copies of the letters addressed by [the Appellant's supervisor] to the [Assistant Secretary-General, OHRM] complaining about [the] Appellant, be removed from the [Official Status] file.

..."

On 12 March 1998, the Under-Secretary-General for Management transmitted a copy of the fourth JAB report to the Applicant and informed him as follows:

"The Secretary-General has re-examined your case in the light of the Board's report. He has taken note of the Panel's discussion of your record of performance with the Organization. Although not in agreement with the specific conclusions of the Panel, the Secretary-General has decided to acknowledge that procedural irregularities did occur and to accept the recommendations of the Panel. Accordingly, the Secretary-General has decided that the within-grade increment withheld from you be restored and paid to you, and your pensionable remuneration be accordingly readjusted; that a copy of this report be placed on your official status file should you so choose; and that copies of the letters addressed by [the Applicant's supervisor] to the Assistant Secretary-General for Human Resources Management complaining about you, be removed from the official status file."

On 7 October 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant's PERs were influenced by bias and prejudice, and the resulting decisions were tainted. The issuance of the PERs and action on their rebuttals were unduly delayed.

2. The Applicant was denied consideration for promotion.

3. The Applicant's terms of appointment and his rights of due process were violated.

4. The letter and spirit of the Staff Regulations and Rules were violated by efforts to terminate the Applicant's appointment and by placing him on SLWFP.

Whereas the Respondent's principal contentions are:

1. The Applicant has not produced reliable evidence to support his claim of prejudice.

2. Applicant was granted appropriate and adequate remedy for procedural irregularities

The Tribunal, having deliberated from 2 to 23 July 2004, now pronounces the following Judgement:

I. The Applicant claims that the Tribunal should award him damages, both compensatory and punitive, for the biased and discriminatory treatment which he received at the hands of the Administration, commencing in December 1989 and which continued until his retirement, on 30 September 1996. There is little doubt that during this extended period, a disproportionate amount of time and effort was spent, both by the Administration and the Applicant, in trying to deal with a complicated series of interlocking actions and reactions, leading finally to the Applicant's recourse to the Tribunal.

Throughout these seven years, the Applicant challenged the relevant administrative actions, consistently claiming that they had been motivated by personal bias and prejudice. His claim before the Tribunal is, essentially, that the Administration failed to deal with his complaint of prejudice in any substantive way. The main issue in this case is whether the several internal recourse procedures which the Applicant had turned to, dealt with the pith and substance of his grievance of personal bias.

After a detailed examination of the record, the Tribunal has come to the view that the Applicant's basic complaint was not substantively evaluated and that his real complaint was treated in a wholly perfunctory manner, despite the great amount of time that everyone involved spent on these complaints. In the Tribunal's view, the Administration failed to give its mind to the material facts and to form a considered view, based on a proper evaluation of all the available material.

II. The Applicant's grievances led to several rebuttal panels and JAB proceedings, culminating in numerous reports. The Applicant finally met with some relative success when he challenged the decisions concerning the recommendation to terminate his service for unsatisfactory performance and concerning the cancellation of his annual within-grade increment. These proceedings appear to have resulted in a deflection of the recommendation to terminate his service, which had been made on the basis of a "special report".

The Respondent did not take an unequivocal position even at this stage. Whilst not accepting the conclusions of the JAB in this final proceeding, he nonetheless followed the recommendations of the JAB, to restore the Applicant's

annual increment; to adjust his pensionable remuneration; to place a copy of the JAB report in his Official Status file; and, to remove several prejudicial letters from his Official Status file. The Tribunal notes, however, that despite this JAB's conclusion that in the Applicant's case, "the Administration had not ... 'fulfilled its obligation with respect to fair treatment and proper and equitable procedure for staff members'", it did not recommend that the Applicant be paid compensation. Rather, the JAB limited its recommendation to measures which would attempt to restore the Applicant to the position that he would have been in, had the subject events and decisions not taken place.

Prior to the submission of the JAB report, a tired Administration had sidelined an exhausted and embittered staff member on SLFWP, from 22 February to 30 September 1996, when the Applicant was finally allowed to fade into retirement.

III. These tortuous proceedings began in February 1990, when the Applicant submitted a rebuttal of his PER covering the period February 1984 to October 1988; but the events to which these proceedings relate commenced three months earlier, in December of 1989.

The Tribunal notes that the Applicant had been working in the Organization for some 15 years, during which he appears to have carried out his duties to the satisfaction of all his supervisors. For four years, from February 1980 to February 1984, the Applicant worked in the Rules and Personnel Manual Section of then Office of Personnel Services. It should be noted that during that period, the Applicant received two PERs, from two different Chiefs of this Section, both of whom evaluated his performance as a "very good performance". In both of these PERs he received a "B" rating for his written and oral English, with an underscoring comment that "[he] has a very good command of English". His proficiency in the English language became an issue later and the Tribunal will refer to this aspect again.

In February 1984, the Applicant was assigned to the Planning and Information Section, OHRM. Here, too, he apparently worked to the satisfaction of his supervisor, at least until August 1989, at which time his supervisor left on an extended mission assignment. The Applicant's performance did not present any problems even then, and there is no record of any reservation on the part of his supervisor, who recommended that the Applicant be made Officer-in-Charge during his absence. Indeed, later, even when difficulties arose between the two of them, the supervisor himself described the Applicant as the "obvious choice".

During the period when the Applicant was discharging these responsibilities as OiC, between 26 August 1989 and 29 February 1990, his then supervisor described the Applicant as having "most ably taken full charge of the Section". This judgment was supported by the Deputy Director, Planning Information and Policy Co-ordination, OHRM, who observed that for more than three months the Applicant's performance had been "fully satisfactory". Both officials recommended, and the Applicant was granted, an SPA for the period November 1989 through February 1990.

January 1990, however, marks a watershed in the Applicant's career. The same supervisor who had appointed him to serve as OiC during his absence, had returned from mission and completed the Applicant's PER, retrospectively covering the period from February 1984 to October 1988. The Tribunal notes that the PER should, in fact, have covered no more than three years and should have been completed at a much earlier stage. This PER showed a marked deterioration in the Applicant's performance, a trend which was later confirmed in his next PER, completed by the same supervisor in 1994, and covering the period from October 1988 to April 1992 (which, again, was too long a period and the completion of which was, again, unduly delayed). The Applicant contested both these PERs, contending that they had been inappropriately motivated and tainted by the difficulties that had arisen between the supervisor and himself, and claiming prejudice and lack of objectivity in their preparation. As the Tribunal already observed, both these PERs were later subjected to rebuttal and JAB proceedings. The Tribunal concurs with the final JAB's finding, that the second contested PER did not reflect the period of the supervisor's absence, during which time the Applicant had served as OiC under a different supervisor, who had found his performance to be "fully satisfactory". In the Tribunal's view, the PER, being the tool used by the Administration for the evaluation of its employees, should reflect the performance of staff members as accurately as possible and accordingly, the Applicant's PER should have reflected his good performance during the relevant period.

Furthermore, the Tribunal considers the delays in the preparation of these two PERs to be inordinate delays, for which no explanation is given. There could be no justification for evaluating a staff member's performance during 1984, in 1990; nor for making such an evaluation in 1994 for work performed in 1988. The Tribunal considers that, while delays are normally considered to be procedural irregularities, in the Applicant's case they might have led to substantive irregularity as well. The Tribunal believes that, as explained below, personal conflict between the Applicant and his supervisor, which took place shortly before preparation of the first

controversial PER, might well have influenced the supervisor in assessing the Applicant's much earlier performance.

IV. The Tribunal considers that the sudden and noticeable change in the assessment of the Applicant's performance should undoubtedly have put any inquirer on notice. This, along with several other aspects of this case, warranted careful examination and evaluation on the basis of the available evidence before conclusions were reached and actions taken. However, the Tribunal finds that there was a continuing lack of will to deal with the troublesome issues that had been raised by the Applicant.

Shortly before completing the Applicant's first controversial PER, the Applicant's supervisor, who had been absent from the office during the previous three months but was making a brief return visit from his mission assignment, addressed a memorandum to the Assistant Secretary-General, OHRM, seeking to substitute a less experienced and more junior officer of the Section to replace the Applicant as its OiC. This recommendation rightly elicited, on 1 February 1990, a firm and timely reproach from the Assistant Secretary-General, OHRM, who did not accede to the proposal. The correspondence on the subject did not end there; the supervisor complained about the Assistant Secretary-General's approach to the issue as "unwarranted" and "undeserved" and indeed pursued this correspondence to the highest level in the Organization.

The Tribunal notes that, in the course of the rebuttal there was some difficulty in finding the above-mentioned memorandum of 1 February 1990 and that, it appears, that the supervisor had denied any recollection of such a memorandum. The Tribunal is of the opinion that, along with the other facts to which the Tribunal has already referred, this was also a matter which should have been examined and accorded the appropriate weight in the assessment of evidence on the substantive issues in this case.

On 2 January 1990, the very day that the Supervisor completed the second contentious PER, he also complained to the Department of Administration and Management about the Applicant having overstepped his authority, an accusation which had not been established in any of the JAB proceedings. A month later, the Applicant complained to the Assistant Secretary-General, OHRM - albeit not copied to his supervisor - that the latter had accused him of a "lack of personal loyalty". On 15 March, the Applicant confronted his supervisor, complaining about the way he had been treated at an earlier staff meeting, to which there appears to be no response from

the supervisor. None of these matters received any attention in the previous proceedings.

Once again, the Tribunal notes that with no attempt to deal with the real complaint which the Applicant had put forward, on 10 April 1992, he was suddenly sent on "reassignment", along with his post but without the appropriate personnel action forms, to the General Service Staffing Section. This reassignment was apparently to be temporary, for a few months, intended to tide over special needs in General Service Staffing Section and was made on the same day that the Applicant's supervisor was leaving on an extended mission to Cambodia. The Tribunal notes that the Applicant had complained that he had tried, without result, to draw the attention of his superiors to his outstanding complaints. Six months later, his supervisor in General Service Staffing Section observed that he was not working in "his preferred element". Nonetheless, he was left there for four years and "special reports" were prepared to show his inadequacies, with the purpose of terminating his permanent appointment for poor performance.

The Tribunal considers this to be an example of, at best, poor managerial discretion. The final JAB rightly stated that:

> "30. The Panel would also call attention to [the fact that] for [several] years [the Applicant] was kept by the Administration in the wrong job under the wrong supervisor while his utility to the Organization continued to erode.
>
> 31. ... After a long period of successful service, [the Applicant] was placed in a job for which he received no training and for which, as [the Applicant's supervisor in General Service Staffing Section] herself acknowledged, he was temperamentally unsuited. Even had he not been demoralized by his eight years with [the supervisor], it is hard to understand how any conscientious supervisor could have expected fully satisfactory performance."

The Tribunal fully endorses this assessment, particularly when considering that for an extended period of time, the Applicant had served to the full satisfaction of several other supervisors. The Administration would be better served by utilizing a valuable resource that it has – that of its staff members – and when problems arise like in the present case, try to find a solution from which both the staff member and the Organization would benefit, rather than resorting to the easiest way out and avoiding the real problem.

V. The Tribunal referred earlier to the controversy concerning the Applicant's proficiency in English and the sudden deterioration in language ability, which was

reflected in his PERs. The Tribunal notes that, while the Applicant was working in the Rules and Personnel Manual Section and participating in drafting and revising of various Personnel Directives, Administrative Instructions and Staff Rules, his knowledge in English was commended, but when the language demands were presumably less, in the areas in which he worked at a later stage, his English language was found wanting. The Applicant has submitted that this deterioration is "scarcely conceivable". Be that as it may, the Tribunal is satisfied that these matters, important as they were to the Applicant's complaints, were simply not evaluated in any meaningful way and that this, combined with the cumulative effect of the way the Applicant was treated over a considerable period of time, resulted in a denial of his rights of due process.

VI. The jurisprudence of the Tribunal clearly demonstrates that it will not make evaluations of a staff member's work and performance. (See Judgement No. 613, *Besosa* (1993).) This is the Administration's prerogative, with which the Tribunal does not lightly interfere. However, in the Tribunal's view, the question in this case is not whether the staff member's ratings were justified. The question is whether the PERs were tainted by prejudice and whether the critical issue of prejudice was properly examined, the evidence evaluated and the complaint substantively dealt with by the appropriate panels which handled the Applicant's grievances. The Tribunal concludes that they were not.

The Tribunal finds that the failure of the Administration to deal with the real substance of the Applicant's complaints led, in turn, to a series of administrative actions; procedural and substantive irregularities; and, inordinate delays, all of which, in the Tribunal's opinion, cumulatively amounted to violation of the Applicant's rights, harassment and victimization of the Applicant over an extended period, from December 1989 to September 1996, warranting the award of compensation.

VII. The Tribunal notes the Applicant's contention regarding the Respondent's refusal to include his name in the 1992 Senior Officer Promotion Register. The Tribunal notes that this was the subject of an appeal before the JAB and, having reviewed the file, the Tribunal is of the opinion that the Applicant's rights in this context were not violated and therefore the Applicant's claim in this regard is rejected.

VIII. In view of the foregoing, the Tribunal:

1. Orders that the Applicant be paid as compensation 20 months' net base salary at the rate in effect at the time of this Judgement; and,

2. Rejects all other pleas.

(*Signatures*)

Kevin **Haugh**
First Vice-President, presiding

Brigitte **Stern**
Second Vice-President

Dayendra Sena **Wijewardane**
Member

Geneva, 23 July 2004

Maritza **Struyvenberg**
Executive Secretary